

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NORBERTO T. ESPINDOLA,

Plaintiff,

v.

WASHINGTON STATE MIGRANT
COUNCIL, JORGE CASTILLO, JANE
DOE CASTILLO, ENRIQUE GARZA,
JANE DOE GARZA, BERNARDO
JARAMILLO, JANE DOE JARAMILLO,
LUANA LUMLEY, JOHN DOE LUMLEY,
JOHN DOES 1-20,

Defendants.

NO. CV-10-03066-EFS

**ORDER HOLDING IN ABEYANCE
DEFENDANTS' MOTION TO DISMISS
IN FULL (INDIVIDUAL
DEFENDANTS) OR IN PART (WSMC)**

Before the Court, without oral argument, is Defendants' Motion to Dismiss in Full (Individual Defendants) or in Part (WSMC) (ECF No. [5](#)). Defendants Jorge Castillo, Enrique Garza, Bernardo Jaramillo, Luana Lumley, and their respective marital communities (collectively, "Individual Defendants"), and the Washington State Migrant Council (WSMC), seek to dismiss Plaintiff Norberto Espindola's remaining claims in full. After reviewing the submitted materials and relevant authority, the Court is fully informed and holds in abeyance Defendants' motion.

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1 **A. Background¹**

2 Defendant WSMC is a private, not-for-profit Washington organization
3 that provides Head Start services in several counties throughout
4 Washington. (ECF No. 1, ¶ 4.) Head Start programs promote children's
5 school readiness by enhancing their social and cognitive development
6 through educational, health, nutritional, social, and other services. 42
7 U.S.C. § 981. The WSMC, while funded by many sources, receives
8 approximately eighty-five percent of its funds from the federal Head
9 Start program. As such, WSMC must adhere to federal Head Start
10 employment laws. (ECF No. 1, ¶¶ 9 & 11.)

11 Until December 17, 2007, Plaintiff was employed by the WSMC as its
12 Chief of Programs Operations. *Id.* ¶¶ 8 & 13. On December 15, 2007, the
13 WSMC Board of Directors ("Board") fired CEO Carlos M. Diaz. *Id.* ¶ 7.
14 Thereafter, the Board decided to reorganize the WSMC's executive office,
15 and by December 17, 2007, all employees (including Plaintiff), were
16 dismissed. *Id.* ¶ 8. Plaintiff claims that these actions were taken in
17 illegally-called meetings and without a legal quorum. *Id.* ¶¶ 7-8.

18 Plaintiff's Complaint alleges that he was wrongfully terminated
19 because he identified several federal-regulation violations by the Board
20 and Board members: 1) serving on the Board despite having conflicts of
21 interest, 2) serving on the Board while being undocumented, illegal
22 aliens, 3) failing to comply with "planning," "shared governance," and
23 the "Head Start Act as enacted on December 12, 2007," 4) unlawfully using
24

25 ¹ The "background" section is based on the Complaint's (ECF No. 1)
26 factual allegations. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949
(2009).

1 federal funding, and 5) failing to include "Policy Councils" in personnel
2 decisions. *Id.* ¶ 12. Although it is not entirely clear from his
3 Complaint, Plaintiff principally argues that he was terminated because
4 he supported the resignation of those Board members who are illegal
5 aliens. As a result of Defendants' actions, Plaintiff suffered lost
6 wages, emotional distress, damage to his personal and professional
7 reputation, loss of income, and loss of professional opportunities, and
8 incurred other costs. *Id.* ¶ 15.

9 Plaintiff filed this lawsuit in Yakima County Superior Court on
10 August 1, 2010. (ECF No. [1](#).) Defendants removed the action to this
11 Court on September 1, 2010. *Id.* His Complaint alleges claims for
12 wrongful termination, hostile work environment, defamation, and
13 retaliation in violation of the Washington Law Against Discrimination
14 (WLAD), RCW 49.60. *Id.* ¶¶ 17-21.

15 Defendants filed the instant motion to dismiss on October 20, 2010.
16 (ECF No. [5](#).) On December 8, 2010, one day before the motion was set for
17 hearing, and after Defendants had filed their reply, Plaintiff sought
18 leave to respond. (ECF No. [11](#).) Although Plaintiff's request was
19 grossly untimely, the Court granted his request and extended the briefing
20 schedule. (ECF No. 21.)

21 **B. Dismissal Standard**

22 Dismissal is appropriate under Federal Rule of Civil Procedure
23 12(b)(6) if the complaint fails to "state a claim upon which relief can
24 be granted." Rule 8 requires that a "claim for relief" must contain "a
25 short and plain statement of the claim showing that the pleader is
26 entitled to relief." Fed. R. Civ. P. 8(a)(2). In assessing whether
Rule 8(a)(2) is satisfied, the Court first identifies the elements of the

1 asserted claim based on statute or case law. *Ashcroft v. Iqbal*, 129 S.
2 Ct. 1937, 1949 (2009). The court then identifies the complaint's factual
3 allegations and the legal conclusions: the court accepts the factual
4 allegations as true and disregards the legal conclusions. *Id.* Then,
5 assuming the veracity of the complaint's factual allegations, the court
6 determines whether they plausibly give the right to an entitlement to
7 relief. *Id.*

8 "The plausibility standard is not akin to a 'probability
9 requirement,' but it asks for more than a sheer possibility that a
10 defendant has acted unlawfully." *Id.* (quoting *Bell Atl. Corp. v.*
11 *Twombly*, 550 U.S. 544, 556 (2007)). "Where a complaint pleads facts that
12 are 'merely consistent with' a defendant's liability, it 'stops short of
13 the line between possibility and plausibility of 'entitlement to
14 relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). "A claim has facial
15 plausibility when the plaintiff pleads factual content that allows the
16 court to draw the reasonable inference that the defendant is liable for
17 the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at
18 556). Detailed factual allegations are not required, but "[t]hreadbare
19 recitals of the elements of a cause of action, supported by mere
20 conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S.
21 at 555).

22 **C. Authority & Analysis**

23 Defendants seek dismissal of all claims set forth in Plaintiff's
24 Complaint: wrongful termination in violation of public policy, hostile
25 work environment, defamation, and WLAD-retaliation. Plaintiff has
26 abandoned his hostile work environment, defamation, and injunctive-relief
claims; accordingly, those claims will be dismissed. (ECF No. [22](#), at 2.)

1 In light of this concession, Defendants limit their failure-to-state-a-
2 claim arguments to Plaintiff's claims for retaliation and wrongful
3 discharge in violation of public policy. They also argue for dismissal
4 of all claims against any remaining Individual Defendants. The Court
5 similarly limits its analysis to those arguments.

6 1. Wrongful Termination

7 Defendants ask the Court to dismiss Plaintiff's wrongful-termination
8 claim because he does not sufficiently plead all essential elements. To
9 state a claim for wrongful termination in violation of public policy, a
10 plaintiff must prove:

11 (1) the existence of a clear public policy (*clarity* element);
12 (2) that discouraging the conduct in which he or she engaged
13 would jeopardize the public policy (*jeopardy* element); and (3)
that the public-policy-linked conduct caused the dismissal
(*causation* element).

14 *Korslund, v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 178 (2005).
15 In addition, the defendant must not be able to justify the dismissal
16 (*absence of justification* element). *Id.* This public-policy based
17 wrongful-termination claim is a narrow exception to Washington's general
18 rule of employment at will. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d
19 219, 232 (1984).

20 The plaintiff "must plead and prove that a stated public policy,
21 either legislatively or judicially recognized, may have been
22 contravened." *Thompson*, 102 Wn.2d 219 at 232-33. A plaintiff must show
23 either an actual violation of law or that the purpose of the law was
24 violated. See *Brundridge v. Flour Fed. Serv. Inc.*, 109 Wn. App. 347
25 (2001) (finding an employer's termination of employees based on
26 employees' refusal to work with unsafe piping violated public policy).

1 The Court finds the Complaint insufficient. Plaintiff's Complaint
2 alleges only that Defendants "participated in an unlawful scheme or
3 course of conduct" that ended in Plaintiff's wrongful termination, "in
4 violation of public policy, rules and regulations, and the charter of the
5 WSMC." (ECF No. 1, ¶ 17.) It fails to articulate the specific public
6 policy, rules and regulations, or portions of the WSMC Charter that
7 Defendants allegedly violated. Furthermore, he fails to plead two
8 additional elements: the jeopardy and absence-of-justification elements.
9 Plaintiff's Complaint contains no allegations that discouraging his
10 conduct would jeopardize a clear mandate of public policy and that
11 Defendants are unable to offer an overriding justification for his
12 dismissal. See ECF No. 1, ¶ 17.

13 Plaintiff submits that he need not plead each element of his claim
14 in the complaint. The Court disagrees. *Iqbal* and *Twombly* require the
15 asserting party to allege facts to support each element of the asserted
16 claim. Here, the inquiry is whether the Complaint's factual allegations,
17 when all reasonable inferences are drawn therefrom, sufficiently allege
18 a claim for wrongful termination in violation of public policy, which is
19 focused on situations where a an employee is fired "for refusing to
20 commit an illegal act, for performing a public duty or obligation, for
21 exercising a legal right or privilege, or for engaging in a
22 whistleblowing activity." *Korslund*, 156 Wn.2d at 178 (citing *Gardner v.*
23 *Loomis Armored, Inc.*, 128 Wn.2d 931, 936 (1996)). The relevant question
24 "is whether the employee's termination would contravene some public, as
25 opposed to purely private, interest." *Reninger v. State Dept. of Corr.*,
26 134 Wn.2d 437, 447 (1998) (citing *Dicomes v. State*, 113 Wn.2d 612, 618

1 (1989) ("[P]ublic policy concerns . . . what affects the citizens of the
2 State collectively.")).

3 Plaintiff argues in his responsive briefing that he had a public
4 duty to report the illegal status of Board members to authorities. This,
5 he argues, was a form of whistleblowing: allowing illegal-alien Board
6 members to remain on the Board could put the continued federal funding
7 in jeopardy. He identifies a clear federal public policy against illegal
8 immigration and in favor of exposing those who reside here illegally
9 (clarity element).² He presumably argues that discouraging his conduct
10 would jeopardize the federal government's ability to effectively
11 prosecute illegal immigrants (jeopardy element). And he further maintains
12 that Defendants terminated him because he exposed their illegal-immigrant
13 status (causation element). Yet he leaves the justification element
14 unaddressed. Accordingly, the Court concludes that Complaint's factual
15 allegations, even when justifiable inferences are taken therefrom, are
16 insufficient to support a wrongful-termination claim based on public
17 policy.³

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20 ² The Court notes that while the Washington Legislature lacks
21 authority to adopt laws regarding immigration, see 8 U.S.C. §
22 1324a(h)(2), a plaintiff may rely on federal law to establish a clear
23 public policy so long as it is not inconsistent with Washington law, see
24 *Korslund*, 156 Wn.2d at 181.

25 ³ Plaintiff cursorily seeks leave to amend his Complaint to add
26 facts to support a claim for wrongful termination in violation of public
policy. He must do so formally by filing such a motion.

1 2. Retaliation

2 Defendants ask the Court to dismiss Plaintiff's retaliation claim
3 because he fails to identify a WLAD-protected act in which he engaged.
4 RCW 49.60.210(1) prohibits an employer from discharging any person
5 because he has 1) opposed any practices forbidden by the WLAD, or 2)
6 participated in protecting against those forbidden practices. To prove
7 such cause of action, and employer must show "(1) he or she engaged in
8 protected activity, (2) the employer took an adverse employment action,
9 and (3) the employee's activity prompted the employer's action."
10 *Burchfiel v. Boeing Corp.*, 149 Wn. App. 468, 482 (2009), rev. denied 166
11 Wn.2d 1038.

12 Plaintiff's Complaint alleges that Defendants retaliated against
13 Plaintiff because of his "actions in bringing to the attention of
14 defendants their illegal activities, their undocumented, illegal alien
15 status in some case[s], and their failure to abide by public policy,
16 rules and regulations governing the WSMC." (ECF No. 1, ¶ 21.)

17 The Complaint fails, however, to allege that he opposed an activity
18 forbidden by the WLAD or participated in protecting against those
19 forbidden practices. The WLAD forbids employers from discriminating
20 against their employees based upon "race, creed, color, national origin,
21 sex, honorably discharged veteran or military status, sexual orientation,
22 or [disability]." RCW 49.60.030(a). Plaintiff's claim is based upon
23 his opposition to the Board's unspecified illegal activities; Plaintiff's
24 Complaint lacks any facts showing that Plaintiff opposed any
25 discriminatory activities taken by the Board based on sex, race, national
26 origin, disability, etc. See *id.* Accordingly, his claim falls outside
the purview of the types of discrimination the WLAD forbids.

1 Yet one WLAD provision may be potentially relevant to Plaintiff's
2 claim. RCW 49.60.210(2) provides: "[i]t is unfair practice for a
3 government agency or government manager or supervisor to retaliate
4 against a whistleblower as defined in chapter 42.40 RCW." Despite his
5 cursory statement that the WSMC, a private nonprofit organization, is
6 primarily (approximately eighty-five percent) funded by federal Head
7 Start funds, he fails to state how WSMC qualifies as a "government
8 agency." He also asserts no facts indicating that he meets Washington's
9 whistleblower definition. See RCW 42.40.020(10) (defining
10 "whistleblower" for WLAD purposes). Accordingly, the Court concludes
11 that Plaintiff has failed to state a WLAD-retaliation claim for which the
12 Court could grant any relief against Defendants.⁴

13 3. Individual Defendants

14 Defendants seek dismissal of all claims against any remaining
15 Individual Defendants,⁵ past or present WSMC employees. Plaintiff's
16 Complaint does not plead any facts sufficient to hold any of the
17 remaining Individual Defendants personally liable to him on either his
18 wrongful-termination or retaliation claims. Here, Plaintiff's Complaint
19 alleges it was the Board collectively-not any member acting
20 individually-who decided to terminate Plaintiff. This does not meet the

21
22 ⁴ Plaintiff must formally seek leave to amend his Complaint to add
23 facts to support a claim for WLAD-retaliation against whistleblowers
24 under RCW 49.60.210(2) by filing such a motion.

25 ⁵ On December 14, 2010, the Court granted the parties' Stipulation
26 to dismiss those Individual Defendants who were current or former Board
members. (ECF No. [19](#).)

1 "plausibility" standard of *Iqbal* and *Twombly* because it does not contain
2 sufficient facts about any Individual Defendant's conduct to "raise a
3 right to relief [against him or her] above the speculative level."
4 *Twombly*, 550 U.S. at 557. Accordingly, the Court finds the Complaint's
5 allegations against the Individual Defendants are insufficient to survive
6 a Rule 12(b)(6) motion.⁶

7 **C. Conclusion**

8 For the reasons set forth above, **IT IS HEREBY ORDERED:**

9 1. Based on Plaintiff's abandonment, the following claims in
10 Plaintiff's Complaint are **DISMISSED WITH PREJUDICE** against all remaining
11 defendants: hostile work environment, defamation, and injunctive relief.

12 2. The words "PROMISSORY ESTOPPEL" are **STRICKEN** from the caption
13 of Plaintiff's Complaint: the Complaint does not plead any such claim.

14 3. Defendants' Motion to Dismiss in Full (Individual Defendants)
15 or in Part (WSMC) (**ECF No. 5**) is **GRANTED** as set forth below, but the
16 ruling is **STAYED** for sixty (60) days.

17 a. All Plaintiff's remaining claims against each of the
18 remaining Individual Defendants (Jorge Castillo, Enrique Garza, Bernardo
19 Jaramillo, Luana Lumley, and their respective marital communities) are
20 **DISMISSED WITHOUT PREJUDICE**.

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23 ⁶ If Plaintiff seeks leave to amend his Complaint to add facts to
24 support claims against any Individual Defendant for WLAD-retaliation
25 against whistleblowers under RCW 49.60.210(2) and wrongful-termination
26 in violation of public policy, he must do so formally by filing such a
motion.

1 b. Plaintiff's claim for wrongful discharge in violation of
2 public policy against WSMC is **DISMISSED WITHOUT PREJUDICE** because it
3 fails to state a claim upon which relief may be granted.

4 c. Plaintiff's WLAD-retaliation claim is **DISMISSED WITHOUT**
5 **PREJUDICE** (RCW 49.60.210(2)) and **DISMISSED WITH PREJUDICE** (RCW
6 49.60.210(1)) **IN PART** because it fails to state a claim upon which relief
7 may be granted.

8 4. If Plaintiff seeks to amend his Complaint, he must file a
9 separate motion to amend, including a proposed amended complaint, **NO**
10 **LATER THAN** fourteen (14) days from the date of this Order. If that is
11 filed, Defendants may file any objections to Plaintiff's motion to amend
12 **NO LATER THAN** fourteen (14) days from the date of Plaintiff's motion; any
13 reply shall be filed **NO LATER THAN** seven (7) days after any response
14 filed. No extensions of time or excess page limits will be granted.

15 **IT IS SO ORDERED.** The District Court Executive is directed to enter
16 this Order and provide copies to counsel.

17 **DATED** this 12th day of April 2011.

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20 S/ Edward F. Shea
21 EDWARD F. SHEA
22 United States District Judge

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